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BEFORE THE ARIZONA CORPORATION ~~AD~~

DOCKET CONTROL

COMMISSIONERS

DOUG LITTLE – Chairman
BOB STUMP
BOB BURNS
TOM FORESE
ANDY TOBIN

Arizona Corporation Commission

DOCKETED

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DOCKETED BY

IN THE MATTER OF:

DOCKET NO. S-20906A-14-0063

CONCORDIA FINANCING COMPANY, LTD, a/k/a
"CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY SERVICES, LLC,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA WANZEK,
husband and wife.

Respondents.

TWENTY-NINTH
PROCEDURAL ORDER
(Denies Motion to Dismiss)

BY THE COMMISSION:

On February 27, 2014, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, and Order for Other Affirmative Action ("Notice") against Concordia Financing Company, Ltd, a/k/a Concordia Finance ("Concordia"), ER Financial & Advisory Services, LLC ("ER"), Lance Michael Bersch, and David John Wanzek and Linda Wanzek, husband and wife (collectively "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of investment contracts and promissory notes within or from Arizona.

The spouse of David John Wanzek, Linda Wanzek ("Respondent Spouse"), is joined in the action pursuant to A.R.S. § 44-2031(C) solely for the purpose of determining the liability of the marital community.

The Respondents were duly served with copies of the Notice.

On March 6, 2014, Respondents ER, Lance Michael Bersch and David John Wanzek filed a Request for Hearing. On March 14, 2014, Respondent Linda Wanzek filed a Request for Hearing.

1 On March 17, 2014, by Procedural Order, a pre-hearing conference was scheduled for April 10,
2 2014.

3 On March 26, 2014, Respondent Concordia filed a Request for Hearing.

4 On March 27, 2014, by Procedural Order, the pre-hearing conference scheduled for April 10,
5 2014, was affirmed, with notice issued to Respondent Concordia.

6 On April 4, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
7 Wanzek (collectively the "ER Respondents") filed a Motion to Dismiss and Answer.

8 On April 9, 2014, Respondent Concordia filed an Answer.

9 On April 10, 2014, at the pre-hearing conference, the parties appeared through counsel and
10 requested oral argument regarding the Motion to Dismiss. The parties further proposed a schedule for
11 filing motions prior to oral argument.

12 On April 15, 2014, by Procedural Order, oral argument and a status conference were scheduled
13 to commence on May 21, 2014. It was further ordered that Respondent Concordia shall file any Motion
14 to Dismiss by April 25, 2014, the Division shall file its Response to the Motions to Dismiss by May 9,
15 2014, and the Respondents shall file any Reply by May 16, 2014.

16 On April 25, 2014, Respondent Concordia filed its Joinder to Motion to Dismiss of Respondents
17 ER Financial & Advisory Services, LLC, Lance Michael Bersh, David John Wanzek and Linda
18 Wanzek.

19 On May 5, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
20 Wanzek filed Acknowledgments of Possible Conflicts.

21 On May 9, 2014, the Division filed its Response to Motion to Dismiss by All Respondents.

22 On May 16, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
23 Wanzek filed their Reply in Support of Motion to Dismiss.

24 On May 21, 2014, oral argument and a status conference were held. The parties appeared
25 through counsel and oral argument was presented. The Motion was taken under advisement and a
26 schedule was proposed for the parties to submit supplemental citations.

27 On May 22, 2014, the Division filed its Supplemental Citation of Authorities.

28 On May 29, 2014, Respondents Concordia, ER, Lance Michael Bersch, David John Wanzek,

1 and Linda Wanzek filed their Joint Supplemental Citation of Authorities.

2 On August 13, 2014, by Procedural Order, it was found that the Respondents had not established
3 dismissal to be appropriate and that it was necessary and proper to proceed with the Respondents'
4 request for a hearing. Accordingly, a prehearing conference was scheduled on September 2, 2014.

5 On September 2, 2014, a pre-hearing conference was held. The parties appeared through
6 counsel. The scheduling of a hearing was discussed. Counsel for the ER Respondents stated they
7 would be filing a special action regarding the motion to dismiss. Counsel for the ER Respondents
8 requested that part of the hearing be held in the Lake Havasu area to accommodate witnesses for the
9 ER Respondents. This request was denied. After much discussion, a commencement date for the
10 hearing was agreed to by the parties.

11 On September 2, 2014, by Procedural Order, a hearing was scheduled to commence on May
12 11, 2015.

13 On January 5, 2015, the Division filed a Motion to Quash Discovery Demands by the ER
14 Respondents. The Division asserted that on November 24, 2014, the Division was served by the ER
15 Respondents with a "First Request for Production of Documents," a "First Set of Non-Uniform
16 Interrogatories," a "First Set of Requests for Admissions," a "Notice of 30(b)(6) Deposition," and a
17 "Notice of Deposition of Gary R. Clapper." The Division contended that the discovery demands by
18 the ER Respondents should be quashed because: discovery in this proceeding is governed by the
19 Administrative Procedure Act and the Commission's Rules, not the Arizona Rules of Civil Procedure;
20 the ER Respondents have not demonstrated a reasonable need for the information they demand; the
21 discovery demands include information and documents that are privileged and/or made confidential by
22 statute; and the discovery demands are unreasonably overbroad, unduly burdensome and oppressive.

23 On January 26, 2015, by Procedural Order, the Division's Motion to Quash Discovery Demands
24 was granted. In light of the ER Respondents' efforts to obtain discovery, the parties' exchange of
25 witness lists and copies of exhibits was accelerated.

26 Later that day, the ER Respondents filed a Response to the Division's Motion to Quash. The
27 ER Respondents contended that: the Commission's Rules allow for broad discovery; discovery is not
28 barred by either the Administrative Procedure Act or statutory confidentiality; the ER Respondents

1 have a reasonable need for, and a constitutional right to, discovery; the requested documents are not
2 privileged or work product; and the discovery is not burdensome. The ER Respondents also requested
3 oral argument on the matter.

4 On January 27, 2015, by Procedural Order, oral argument was scheduled to be held on February
5 11, 2015. Later that day, the Division filed a Notice of Intent to File Reply in Support of Motion to
6 Quash Discovery Demands by the ER Respondents.

7 On February 3, 2015, the Division filed its Reply in Support of Motion to Quash Discovery
8 Demands by the ER Respondents. The Division argued that: the ER Respondents have not properly
9 sought discovery as provided under the Administrative Procedure Act and the Commission's rules; the
10 Arizona Rules of Civil Procedure do not apply to discovery in this proceeding; prior procedural orders
11 and Commission decisions cited by the ER Respondents can be distinguished or otherwise fail to
12 support ordering the discovery sought; the ER Respondents have not demonstrated a reasonable need
13 for the discovery sought; many of the documents sought are protected work product; and the discovery
14 sought is confidential under A.R.S. § 44-2042(A).

15 On February 5, 2015, the Division filed a Notice of Errata Regarding its Reply in Support of
16 Motion to Quash Discovery Demands by the ER Respondents.

17 On February 10, 2015, ER Respondents filed a Motion to Compel seeking discovery from
18 Respondent Concordia and requesting oral argument. The ER Respondents contend that the
19 Commission's rules allow broad discovery; their requests for production of documents are specific and
20 not overbroad or burdensome; Concordia is the custodian of its own records; and a subpoena is not
21 required as Concordia is a party to this proceeding. The ER Respondents further attached an affidavit
22 from Respondent David John Wanzek responding to Concordia's communicated demand for a sworn
23 statement as to the ER Respondents' claims that they returned files to Concordia and that Mr. Bersch
24 and Mr. Wanzek were privy to attorney-client communications between Concordia and its counsel.

25 On that same day, counsel for ER Respondents filed a Notice of Change of Law Firm and
26 Notice of Association with Counsel.

27 On February 11, 2015, oral argument was held. The parties appeared through counsel. The
28 Division and the ER Respondents presented oral argument in favor of their respective positions on the

1 ER Respondents' requests for discovery. In light of the approaching commencement date of the
2 hearing, the presiding Administrative Law Judge ruled from the bench, finding that while the
3 Administrative Procedure Act applies, fairness dictates that in this case the Division more promptly
4 provide the Respondents with certain documents in its possession. Though the prior order quashing
5 the ER Respondents' discovery requests was affirmed, the Division was directed to disclose to the
6 Respondents, by February 26, 2015, the contracts it intends to submit as evidence of the 446 alleged
7 investments. The Division contended that it may not have contracts for all 446 of the alleged
8 investments and that the time required for redaction of this many documents might make it difficult to
9 meet the disclosure deadline. The Administrative Law Judge directed the Division to prioritize those
10 contracts involving the ER Respondents and permitted the Division to disclose by March 12, 2015, any
11 contracts which, after a good faith effort, are not ready by February 26, 2015. Additionally, the
12 Division was directed to disclose the transcript from the examination under oath of Respondent Lance
13 Michael Bersch, and the exhibits used therein, by February 26, 2015. The documents ordered to be
14 disclosed by February 26, 2015, are all documents Division counsel stated he planned to use at hearing
15 and, therefore, would have been subject to disclosure by the March 12, 2015 scheduled exchange of
16 exhibits and witness lists.

17 On February 13, 2015, by Procedural Order, the Division was directed to disclose documents
18 to the Respondents as set forth at by the Administrative Law Judge at oral argument on February 11,
19 2015.

20 On February 17, 2015, the ER Respondents filed an Application for Administrative Subpoena
21 requesting a subpoena for the deposition of anticipated Division witness Gary R. Clapper. The ER
22 Respondents also filed an Application for Administrative Subpoena requesting a subpoena for the
23 deposition of an Expert Accounting Witness to be designated by the Securities Division.

24 On March 6, 2015, the ER Respondents filed a Notice of Filing Affidavits of Service.

25 On March 9, 2015, by Procedural Order, a telephonic status conference was scheduled to
26 convene on March 16, 2015. The purpose of the status conference was to address whether the ER
27 Respondents continued to seek the production of further documents from Respondent Concordia in
28 light of the upcoming deadline for disclosure of exhibits and witness lists.

1 On March 11, 2015, Respondent Concordia filed its Motion to Extend Time to Exchange List
2 of Witnesses and Exhibits. Respondent Concordia requested an extension of the deadline to exchange
3 its List of Witnesses and Exhibits to March 20, 2015, based upon counsel for Concordia's upcoming
4 depositions and injunction hearings in matters unrelated to this case. In the motion, counsel for
5 Concordia noted that counsel for the ER Respondents had been contacted and would not agree to an
6 extension.

7 On March 12, 2015, the ER Respondents filed a Response in Opposition to Motion to Extend
8 Time to Exchange List of Witnesses and Exhibits. The ER Respondents opposed the motion for the
9 stated reasons that the hearing is imminent and the information is necessary for their defense.

10 Later on March 12, 2015, Respondent Concordia filed its List of Witnesses and Exhibits. The
11 ER Respondents also filed a Notice of Service of List of Witnesses and Exhibits.

12 On March 16, 2015, a telephonic status conference was held. The parties appeared through
13 counsel. The ER Respondents clarified which documents they continued to seek from Concordia.
14 Counsel for Concordia indicated the Respondents may be able to resolve the issue among themselves
15 within a couple weeks as Concordia needed time to prepare financial statements and ready board
16 minutes for disclosure. The Respondents agreed to work toward resolving the discovery issues raised
17 in the ER Respondents' Motion to Compel pending another status conference, and they further agreed
18 to include the Division in the discovery process.

19 It was further determined at the status conference that Concordia's Motion to Extend Time to
20 Exchange List of Witnesses and Exhibits had been rendered moot by Concordia's filing of a List of
21 Witnesses and Exhibits, though Concordia may supplement its exhibits and witness lists based upon
22 ongoing discovery. Also discussed was the Division's intent to amend the Notice of Opportunity to
23 include Linda Wanzek as a participant, as opposed to being joined solely for determining the liability
24 of the marital community. The Division agreed to file a motion to amend the Notice of Opportunity.
25 The Division also stated its intent to file a motion to quash the scheduled depositions of Gary Clapper
26 and an expert accounting witness. A schedule was determined for motion practice and oral argument
27 on the motion to quash.

28 On March 18, 2015, by Procedural Order, oral argument was scheduled for April 2, 2015, to

1 address the issue of the Division's motion to quash. A status conference regarding Concordia's
2 production of discovery was set for the same time.

3 On March 20, 2015, the Division filed a Motion to Quash Subpoenas, or in the Alternative,
4 Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division contended that the
5 subpoenas should be quashed as they did not comply with the Administrative Procedure Act and the
6 Respondents now have the documents and information they claim they needed. In the alternative, the
7 Division argued that the scope of the depositions should be limited to only that information the ER
8 Respondents specifically identified in their Applications for Subpoenas.

9 On March 27, 2015, the ER Respondents filed a Response to the Securities Division's Motion
10 to Quash Subpoenas. The ER Respondents contended that the subpoenas complied with the
11 Commission's rules and the Administrative Procedure Act, that the ER Respondents have a reasonable
12 need for the depositions, and that the scope of the depositions should not be limited.

13 On that same day, the ER Respondents also filed a copy of a letter sent to counsel for the
14 Division. The letter was identified as an objection to the Division's investigative subpoenas for
15 Respondents David and Linda Wanzek. The ER Respondents noted that the Division has contended in
16 the past that an Administrative Law Judge lacks the power to quash an investigative subpoena.
17 However, the ER Respondents stated they filed a copy of the letter as a record of their objections.

18 On April 1, 2015, the Division filed its Reply in Support of Motion to Quash Subpoenas, or in
19 the Alternative, Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division argued
20 that the subpoenas should be quashed because there is no finding in the record that the ER Respondents
21 have demonstrated a reasonable need for the deposition testimony, the applications for subpoena were
22 deficient and misleading as the ER Respondents have now identified additional matters for discovery
23 beyond those stated in the applications, and the ER Respondents have received all the documents and
24 information they claimed to need. In the alternative, the Division argued that the scope of the
25 subpoenas should be limited based upon: the matters for which the ER Respondents have established
26 a reasonable need pursuant to the Administrative Procedure Act; the Division's deliberative process
27 and attorney-client privileges; and the Securities Act's confidentiality statute, A.R.S. § 44-2042(A).

28 On April 2, 2015, a status conference and oral argument were held. The parties appeared

1 through counsel. Counsel for the Respondents stated that Respondent Concordia is in the process of
2 preparing requested documents for disclosure to the ER Respondents. Respondent Concordia asserted
3 that some documents are likely in the possession of the Division, having been obtained from the State
4 of California following proceedings conducted there, and could be more easily obtained from the
5 Division. The Division asserted that the Securities Act's confidentiality statute applied, but noted that
6 it would make available supporting documentation used by the Division's accountant in creating his
7 Financial Data Summary.

8 The Division and the ER Respondents presented oral argument in favor of their respective
9 positions on the Division's Motion to Quash Subpoenas, or in the Alternative, Motion for a Procedural
10 Order Limiting the Scope of Subpoenas. Having considered the written and oral arguments presented
11 by the parties, as well as the statutes, rules and other authority cited therein, the presiding
12 Administrative Law Judge ruled from the bench and quashed the two subpoenas pursuant to A.A.C.
13 R14-3-109(O). The Administrative Law Judge found that the Administrative Procedure Act applies
14 and therefore, the ER Respondents must establish reasonable need for the information sought in the
15 depositions. In finding that the ER Respondents did not have reasonable need to proceed with the
16 depositions, the Administrative Law Judge noted: the numerous documents disclosed by the Division
17 as exhibits subsequent to the issuance of the subpoenas; the forthcoming disclosure by the Division of
18 the documents used by the accountant; the effect of these disclosed documents upon any current
19 reasonable need for the depositions regarding those six areas specifically identified in the ER
20 Respondents' Application for Subpoenas; and the schedule of the hearing, which will allow the ER
21 Respondents additional time before presenting their case, thereby overcoming any surprise that may
22 arise during the Division's presentation of its case in chief.

23 On April 3, 2015, by Procedural Order, the two subpoenas commanding attendance of the
24 Division witnesses for depositions were quashed, as decided at the April 2, 2015 status conference.
25 The Division was ordered to disclose by April 15, 2015, the supporting documentation relied upon by
26 the Division's accountant in creating his Financial Data Summary. The Respondents were further
27 ordered to continue to work toward resolving outstanding discovery issues arising from the ER
28 Respondents' Motion to Compel.

1 On April 17, 2015, the ER Respondents filed a Motion to Continue Hearing. The reason for
2 seeking a continuance was due to health conditions of Respondent Lance Michael Bersch. The ER
3 Respondents requested that a status conference be set in about six months with the ER Respondents to
4 file a status report at least 21 days before the status conference.

5 On April 22, 2015, by Procedural Order, a status conference was scheduled for April 28, 2015,
6 to address the ER Respondents' Motion to Continue Hearing.

7 On April 24, 2015, Respondent Concordia filed its Response to Motion to Continue.
8 Respondent Concordia had no objection to the continuance requested by the ER Respondents.

9 On April 24, 2015, the Division filed a Motion for Leave to File Amended Notice of
10 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order
11 for Administrative Penalties, and Order for Other Affirmative Action. The Division sought leave to
12 amend its Notice of Opportunity for Hearing to provide greater detailed factual allegations and to
13 expound upon the fraud allegations from the original Notice.

14 Also on April 24, 2015, the Division filed its Response to the Motion to Continue Hearing. The
15 Division contended that the ER Respondents' Motion to Continue should be denied as the ER
16 Respondents have failed to provide sufficient information to justify a postponement due to illness.
17 However, the Division proposed a three month continuance of the hearing if leave is granted to amend
18 the Notice of Opportunity.

19 On April 28, 2015, a telephonic status conference was held. The parties appeared through
20 counsel. The ER Respondents' Motion to Continue and the Division's Motion for Leave to File
21 Amended Notice were both discussed. It was also noted that a hearing was scheduled to convene in
22 Superior Court on April 29, 2015, regarding a Motion to Stay Administrative Hearing filed by
23 Respondents Bersch, Wanzek and Mrs. Wanzek, pursuant to their Notice of Appeal of the final
24 judgment in the special action. A schedule was set for the filing of motions which would be addressed
25 at a future status conference. The parties also agreed to vacate the scheduled hearing commencing on
26 May 11, 2015.

27 On April 28, 2015, by Procedural Order, a status conference was scheduled to be held on May
28 7, 2015, to address the pending motions and schedule a hearing date. The Procedural Order further set

1 deadlines for the filing of responses and replies regarding the pending motions. The Procedural Order
2 also vacated the hearing scheduled to commence on May 11, 2015.

3 On April 29, 2015, the Division filed a Status Report Regarding the Superior Court Hearing on
4 Motion to Stay Administrative Case Pending Appeal. The Division reported that the Superior Court
5 hearing on the Motion to Stay Administrative Hearing did not occur as scheduled on April 29, 2015.
6 The Division stated that the hearing was rescheduled for May 4, 2015.

7 On May 4, 2015, the ER Respondents filed a Reply in Support of Motion to Continue Hearing.
8 The ER Respondents provided additional information regarding the medical condition of Respondent
9 Bersch. Included as an exhibit to the reply was a letter from Mr. Bersch's doctor, who projected a
10 recovery date for Mr. Bersch of July 15, 2015.

11 On that same date, the ER Respondents also filed a Response to Securities Division's Motion
12 for Leave to File Amended Notice of Opportunity. The ER Respondents stated no objection to granting
13 the Division leave to amend the Notice. The ER Respondents noted they would need additional time
14 to address the new allegations. The ER Respondents further stated that they would reserve: the right
15 to challenge the sufficiency of the new allegations by motion to dismiss; the right to include affirmative
16 defenses, cross-claims, counterclaims or third party claims with their answer to the amended notice;
17 and the right to review discovery related to the new allegations.

18 Also on May 4, 2015, the Division filed a Status Report Regarding the Superior Court Hearing
19 on Motion to Stay Administrative Case Pending Appeal. The Division noted that the Court ruled from
20 the bench and denied the Motion to Stay Administrative Hearing Pending Appeal. The Division stated,
21 however, that the Court issued a temporary 30-day stay that would apply only to an evidentiary hearing
22 before the Commission and not to the procedural conference set for May 7, 2015.

23 On May 5, 2015, Respondent Concordia filed its Response to Motion for Leave to File
24 Amended Notice of Opportunity. Respondent Concordia stated that it had no objection to the
25 Division's motion.

26 On May 6, 2015, the Division filed a Motion to Take Official Notice of the Superior Court's
27 Minute Entry Denying Motion to Stay Administrative Case Pending Appeal. The Division attached as
28 an exhibit a copy of the Superior Court's May 4, 2015 minute entry in Maricopa County Superior Court

1 Case No. LC2014-000415-001. In denying the request for stay, the Court found that the Plaintiffs had
2 failed to demonstrate: (1) a likelihood of success on the merits, (2) that they would be irreparably
3 harmed if a stay is not granted, (3) that a stay would not injure the opposing party, and (4) that a stay
4 furthers the public interest. The Court did order a temporary stay of thirty days, or until June 3, 2015,
5 to apply to the Court of Appeals for a stay of the administrative hearing.

6 On May 7, 2015, a telephonic status conference was held as scheduled. The parties appeared
7 through counsel. Without objection by the Respondents, the Administrative Law Judge took official
8 notice of the May 4, 2015 minute entry in Maricopa County Superior Court Case No. LC2014-000415-
9 001. The parties agreed that the temporary stay ordered by the Court did not preclude present action
10 on the pending motions and the scheduling of a hearing date after June 3, 2015. Without objection, the
11 Division's Motion for Leave to File Amended Notice of Opportunity was granted. Discussion was
12 held regarding the scheduling of the hearing and a new hearing date was agreed upon. Based upon the
13 new hearing date and the projected recovery time for Mr. Bersch, the ER Respondents acknowledged
14 that their April 17, 2015 Motion to Continue Hearing was now moot. The ER Respondents also
15 acknowledged that they no longer had any discovery issues with regard to Respondent Concordia, as
16 raised originally in the ER Respondents Motion to Compel filed on February 10, 2015. The parties
17 acknowledged that, in light of the soon to be filed amended Notice, the ER Respondents would reserve
18 their prior arguments as set forth in their April 4, 2014 Motion to Dismiss and Answer.

19 On May 7, 2015, by Procedural Order, a hearing was scheduled to commence on August 5,
20 2015.

21 On May 7, 2015, the Division filed an Amended Notice of Opportunity for Hearing Regarding
22 Proposed Order to Cease, and Desist, Order for Restitution, Order for Administrative Penalties and
23 Order for Other Affirmative Action ("Amended Notice").

24 On May 19, 2015, the ER Respondents filed Requests for Hearing. Each of the four ER
25 Respondents filed a separate Request for Hearing.

26 On May 21, 2015, Concordia filed a Request for Hearing.

27 On June 8, 2015, the ER Respondents filed a Motion to Dismiss and Answer to Amended Notice
28 of Opportunity ("Motion and Amended Answer"). The ER Respondents sought dismissal of the

1 Division's fraud allegation that the ER Respondents failed to disclose to offerees and investors they
2 were engaging in the conduct of an unlicensed escrow business by serving as a Custodian. The ER
3 Respondents argued dismissal was appropriate because the Commission has no jurisdiction to enforce
4 escrow laws and the alleged violation does not constitute securities fraud.

5 Also on June 8, 2015, Respondent Concordia filed its Answer to Amended Notice of
6 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order
7 for Administrative Penalties, and Order for Other Affirmative Action.

8 On June 16, 2015, the ER Respondents filed a Status Report regarding their Motion to Stay
9 filed with the Arizona Court of Appeals.

10 On June 22, 2015, the Division filed its Response to Motion to Dismiss by the ER Respondents.
11 The Division argued that jurisdiction was proper because they are seeking to enforce anti-fraud
12 provisions of the Securities Act. The Division cited *S.E.C. v. Levine*, 671 F. Supp. 2d 14, 28-29 (D.D.C.
13 2009), as precedent for finding securities fraud in an investment promoter's non-disclosure of acting
14 as an unlicensed escrow agent. The Division further asserted that the failure of the ER Respondents to
15 disclose their acting as an unlicensed escrow business constituted a material omission.

16 On June 30, 2015, the ER Respondents filed their Reply in Support of Motion to Dismiss. The
17 ER Respondents argued that *Levine* is non-controlling authority and factually distinguishable. The ER
18 Respondents further contended that materiality is a legal conclusion and that the Division has failed to
19 set forth factual allegations to support its theory.

20 On July 2, 2015, the Division filed a Motion for Order Requiring Respondent Concordia to file
21 an Amended Answer that Complies with R14-4-305. The Division contended that Concordia's June
22 8, 2015 Answer fails to specifically admit or deny several of the allegations made in the Amended
23 Notice.

24 On July 6, 2015, Respondent Concordia filed a Stipulated Motion to Extend Time to Exchange
25 Supplemental List of Witnesses and Exhibits ("Stipulated Motion"). The Stipulated Motion stated that
26 counsel for the Division and counsel for the Respondents have conferred and agreed to extend the time
27 to exchange their Supplemental List of Witnesses and Exhibits to July 15, 2015.

28 On July 7, 2015, by Procedural Order, the ER Respondents' June 8, 2015 Motion to Dismiss

1 was denied because the Commission has jurisdiction over an allegation of fraud in connection with the
2 offer or sale of securities and the ER Respondents failed to establish that the Division would be entitled
3 to no relief under any state of facts susceptible of proof as to that portion of the Amended Notice for
4 which dismissal was sought.

5 On July 15, 2015, the ER Respondents filed a Notice of Service of Updated List of Witnesses
6 and Exhibits.

7 On that same date, Respondent Concordia filed a Motion for Settlement Conference.
8 Respondent Concordia asserts its belief that the allegations against it can be resolved short of
9 proceeding with a hearing.

10 Also on July 15, 2015, the Division filed a Motion for Leave to Present Telephonic Testimony.
11 The Division contends that good cause exists to allow the use of telephonic testimony at the hearing as
12 eleven of its witnesses are located in Tucson, Lake Havasu City, or outside Arizona. The Division
13 contends that telephonic testimony is permitted under the Commission's Rules of Practice and
14 Procedure and its use would not abridge the Respondents' due process rights.

15 On July 16, 2015, a telephonic procedural conference was held as scheduled. The parties
16 appeared through counsel. The ER Respondents provided a status report on their pending Motion to
17 Stay filed with the Arizona Court of Appeals. The parties discussed the merits of holding a settlement
18 conference and agreed upon a date. The parties discussed the Division's Motion for Leave to Present
19 Telephonic Testimony and a schedule was set for responses to the motion. Respondent Concordia
20 stated its intent to file an amended answer.

21 Also on July 16, 2015, by Procedural Order, Respondent Concordia's Motion for Settlement
22 Conference was granted. The Division's Motion for an Order Requiring Respondent Concordia to file
23 an Amended Answer was also granted. A settlement conference was set for July 23, 2015. Filing dates
24 were scheduled for Concordia's Amended Answer and for motions regarding requests for telephonic
25 testimony at the hearing.

26 On July 17, 2015, Respondent Concordia filed an Amended Answer to Amended Notice of
27 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order
28 for Administrative Penalties, and Order for Other Affirmative Action.

1 On July 20, 2015, the ER Respondents filed a Motion to Allow Telephonic Testimony of
2 Witnesses. The ER Respondents requested that 67 of their listed witnesses be permitted to testify
3 telephonically as these witnesses live outside of the Phoenix area.

4 Also on July 20, 2015, the ER Respondents filed a Response to the Division's Motion for Leave
5 to Present Telephonic Testimony. The ER Respondents stated no objection to the telephonic testimony
6 of the Division's investor witnesses and no objection to the Division's witness from the California
7 Department of Business Oversight, who will be testifying to only the authentication of documents. The
8 ER Respondents specifically objected to the telephonic testimony of A. Craig Mason, Jr., a non-
9 investor expected to be subject to "substantial" cross-examination.

10 On July 21, 2015, Respondent Concordia filed its Response to the Division's Motion for Leave
11 to Present Telephonic Testimony, stating no objection to the motion.

12 Also on that day, Respondent Concordia Filed an Updated List of Witnesses and Exhibits.

13 On July 23, 2015, a settlement conference was held.

14 On July 24, 2015, the Division filed its Response/Non-Opposition to the ER Respondents'
15 Motion to Allow Telephonic Testimony of Witnesses, and Reply in Support of Motion for Leave to
16 Present Telephonic Testimony. The Division contended that: good cause exists to allow the out-of-
17 state Mr. Mason to testify telephonically, the Commission cannot subpoena him under A.A.C. R14-3-
18 109(O), it would be cost prohibitive to bring him in for an anticipated direct testimony of less than
19 fifteen minutes, and permitting him to testify telephonically comports with procedural due process.

20 On July 27, 2015, by Procedural Order, the Division's Motion for Leave to Present Telephonic
21 Testimony and the ER Respondents' Motion to Allow Telephonic Testimony of Witnesses were
22 granted. A telephonic procedural conference was scheduled to commence on July 29, 2015, at 10:00
23 a.m.

24 Also on that day, the ER Respondents filed a Motion in Limine Number One: Objection to
25 Proposed Exhibits S-176(a) and S-176(b), a Motion in Limine Number Two: Objection to Proposed
26 Exhibit S-177, a Request for Public Broadcast of the Hearing, and a Motion for Clarification.

27 On July 28, 2015, the Division filed a Response to Motion for Settlement Conference and
28 Objection to Counsel's Unannounced Departure from Settlement Conference.

1 Also on July 28, 2015, the ER Respondents filed a Notice of Court of Appeals Order Staying
2 Proceedings in this Docket. The ER Respondents included a copy of the Order Granting Stay of
3 Administrative Hearing Pending Appeal, filed July 28, 2015, in Court of Appeals Division One No. 1
4 CA-CV 15-0340 (Maricopa County Superior Court No. LC2014-000415-001).

5 On July 29, 2015, by Procedural Order, the stay of administrative proceedings ordered by the
6 Arizona Court of Appeals was acknowledged. The telephonic procedural conference, scheduled to
7 commence on July 29, 2015, and the hearing, scheduled to commence on August 5, 2015, were both
8 vacated. The parties were ordered to file a joint written report regarding the status of the proceedings
9 in Court of Appeals Division One No. 1 CA-CV 15-0340 on November 2, 2015, and every ninety days
10 thereafter. The parties were further ordered to file a joint status report within five days upon a change
11 in status of the stay or a disposition of the appeal having been made by the Court of Appeals.

12 On November 2, 2015, the parties filed a Joint Status Report regarding the Status of the
13 Proceedings in the Arizona Court of Appeals. The parties asserted that the appeal filed by Mr. Bersch
14 and Mr. and Mrs. Wanzek of the entry of final judgment entered in Maricopa County Superior Court
15 No. LC2014-000415-001 had been fully briefed and that the parties had requested oral argument before
16 the Arizona Court of Appeals.

17 On February 1, 2016, the parties filed a Second Joint Status Report regarding the Status of the
18 Proceedings in the Arizona Court of Appeals. The parties asserted that the Arizona Court of Appeals
19 had granted the requests for oral argument but no date had been scheduled. The parties also asserted
20 further briefs were submitted to the Arizona Court of Appeals after the Arizona Attorney General was
21 permitted to file a brief as Amicus Curiae.

22 On April 29, 2016, the parties filed a Third Joint Status Report regarding the Status of the
23 Proceedings in the Arizona Court of Appeals. The parties stated that the matter had been fully briefed
24 and oral argument set for May 10, 2016.

25 On June 3, 2016, the Division filed a Notice of Lodging of Court of Appeals Decision. The
26 Division asserted that the Arizona Court of Appeals decision affirmed the judgment of the Superior
27 Court and vacated the Court of Appeals' stay of the proceedings.

28 Also on June 3, 2016, the Division filed a Motion for Status Conference to Schedule Hearing.

1 The Division contended that since the Arizona Court of Appeals has vacated its stay of these
2 proceedings, the proceedings should promptly resume.

3 On June 13, 2016, by Procedural Order, a status conference was scheduled to commence on
4 June 29, 2016.

5 On June 29, 2016, the status conference was held as scheduled. The parties appeared through
6 counsel. The scheduling of a hearing date was discussed. Also discussed were the status of pending
7 motions filed by the ER Respondents. Counsel for the ER Respondents acknowledged that the July
8 27, 2015 Motion for Clarification no longer needed to be addressed due to the prior stay of these
9 proceedings. The Administrative Law Judge stated that the July 27, 2015 Request for Public Broadcast
10 of the Hearing could not be acted upon as decisions regarding broadcasting are beyond the scope of his
11 authority. A deadline date for the Division to respond to the two July 27, 2015 motions in limine was
12 discussed. Counsel for the ER Respondents stated his intent to file a petition for review of the
13 Memorandum Decision in Arizona Court of Appeals Division One No. 1 CA-CV 15-0340.

14 On June 30, 2016, by Procedural Order, a hearing was scheduled to commence on November
15 28, 2016.

16 On August 1, 2016, the Division filed its Response to Motion in Limine Number One: Objection
17 to Proposed Exhibit 176(a) and Exhibit 176(b).

18 Also on August 1, 2016, the Division filed its Response to Motion in Limine Number Two:
19 Objection to Proposed Exhibit 177.

20 On August 12, 2016, the ER Respondents filed a Reply in Support of Motion in Limine Number
21 One.

22 Also on August 12, 2016, the ER Respondents filed a Reply in Support of Motion in Limine
23 Number Two.

24 On September 7, 2016, the ER Respondents filed a Motion to Continue Hearing. The ER
25 Respondents contended that this matter was more suitable for postponing rather than another matter
26 involving counsel for the Division.

27 On September 12, 2016, by Procedural Order, the ER Respondents' Motion in Limine Number
28 One: Objection to Proposed Exhibits S-176(a) and S-176(b) was denied. Further, the ER Respondents'

1 Motion in Limine Number Two: Objection to Proposed Exhibit S-177 was taken under advisement.
2 Due to a change in the date of the Commission's November Open Meeting, the hearing was scheduled
3 to commence on November 30, 2016.

4 On September 20, 2016, the Division filed its Response to the ER Respondents' Motion to
5 Continue Hearing. The Division contended that good cause, pursuant to A.A.C. R14-3-109(Q), had
6 not been established to continue the hearing.

7 Also on September 20, 2016, the Division filed a Consent to Email Service.

8 On September 21, 2016, a Procedural Order was issued regarding the Division's Consent to
9 Email Service.

10 On September 22, 2016, by Procedural Order, the ER Respondents' Motion to Continue
11 Hearing was denied.

12 On September 26, 2016, Respondent Concordia filed a Stipulation to Extend the September 29,
13 2016 Deadline for Final Exchange of Witness Lists and Exhibits from September 29, 2016, to October
14 28, 2016. Concordia stated that the parties stipulated to the extension and good cause existed as
15 Concordia's accountant was in the process of gathering exhibits but could not proceed due to having
16 given birth on September 22, 2016.

17 On September 28, 2016, the ER Respondents filed a Consent to Email Service.

18 On September 30, 2016, a Procedural Order was issued approving the ER Respondents'
19 Consent to Email Service.

20 Also on September 30, 2016, by Procedural Order, an extension of the September 29, 2016
21 deadline for the exchange of supplemental or amended copies of witness lists and additional exhibits
22 was granted to October 28, 2016.

23 On October 31, 2016, Paul J. Roshka, Jr. and Craig M. Waugh of Polsinelli PC filed an
24 Application for Withdrawal of Counsel for ER Respondents ("Application to Withdraw"). Pursuant to
25 A.A.C. R14-3-104(E), Mr. Roshka and Mr. Waugh applied to withdraw as counsel for the ER
26 Respondents, who would continue to be represented by Timothy J. Sabo of Snell & Wilmer, L.L.P.

27 Also on October 31, 2016, Respondent Concordia filed a Motion to Dismiss Requested Relief
28 of Restitution and Administrative Penalties ("Motion to Dismiss Requested Relief").

1 On November 3, 2016, a Procedural Order was issued granting the Application for Withdrawal
2 of Counsel for ER Respondents filed by Paul J. Roshka, Jr. and Craig M. Waugh of Polsinelli PC.

3 On November 14, 2016, the Division filed a Response to Concordia's Motion to Dismiss
4 Requested Relief of Restitution and Administrative Penalties ("Response").

5 On November 16, 2016, by Procedural Order, a telephonic procedural conference was
6 scheduled for November 18, 2016.

7 On November 16, 2016, the Division filed a Notice of Lodging Order from Arizona Supreme
8 Court Denying Motion to Stay Administrative Hearing.

9 On November 18, 2016, the telephonic procedural conference was held as scheduled. The
10 parties appeared through counsel. Discussion was held regarding procedural issues and the hearing
11 schedule in light of the Petition for Review, from Court of Appeals Division One No. 1 CA-CV 15-
12 0340, appearing on the Arizona Supreme Court's calendar for December 13, 2016, and activities at the
13 Commission that may affect the scheduled hearing dates. Modification of the hearing schedule was
14 found to be necessary.

15 On November 18, 2016, by Procedural Order, the hearing dates were modified.

16 On November 18, 2016, Respondent Concordia filed a Notice Regarding Scheduling Conflict
17 from December 27-30, 2016. Concordia requests that no hearing dates be scheduled from December
18 27-30, 2016, as Concordia's out of state representatives would not be available.

19 On November 23, 2016, Respondent Concordia filed a Reply in Support of Motion to Dismiss
20 Requested Relief of Restitution and Administrative Penalties ("Reply").

21 Motion to Dismiss Requested Relief

22 In the Motion to Dismiss Requested Relief, Concordia contends that it is entitled to a jury trial,
23 under the Arizona Constitution, regarding the Division's demands for restitution and penalties.
24 Concordia notes that neither the Amended Notice nor the Commission's rules and procedures provide
25 for a jury trial. Concordia contends that restitution claims are damages claims, as stated in A.A.C.
26 R14-4-308(C)(1), the type of which would have existed at common law at the time of statehood, giving
27
28

1 rise to a right to a jury trial.¹ Regarding administrative penalties, Concordia cites the United States
 2 Supreme Court as holding, in *Tull v. United States*, 481 U.S. 412, 420 (1987), that seeking a penalty is
 3 analogous to an eighteenth century action in debt compelling a jury trial. Concordia further argues that
 4 SEC actions seeking civil penalties require a jury trial under the Seventh Amendment.² As the
 5 Commission has no provision to allow Concordia to exercise its right to a jury trial, Concordia contends
 6 that the claims for restitution and penalties must be dismissed.

7 In the Response, the Division contends that Concordia does not have a right to a jury trial on
 8 the Division's statutory claims, including the statutory remedies of restitution and administrative
 9 penalties. The Division cites three Arizona cases for the precedent that Article 2, Section 23 of the
 10 Arizona Constitution does not impose a right to a jury trial for statutory claims that did not exist prior
 11 to statehood.³ The Division argues that the remedies of restitution and administrative penalties arise
 12 from the Act, enacted in 1951, and were not provided for at the time of the adoption of the Arizona
 13 Constitution in 1910, therefore Article 2, Section 23 did not preserve a jury trial for those claims, which
 14 did not exist at the time. Further, the Division notes that the United States Supreme Court has held that
 15 the Seventh Amendment right to a jury trial is not applicable to administrative proceedings.⁴ Lastly,
 16 the Division argues that Concordia relies upon inapposite and nonbinding cases that do not establish a
 17 basis for dismissal of the requested relief of restitution and administrative penalties.

18 In the Reply, Concordia argues that the United States Supreme Court's decision in *Atlas*
 19 *Roofing* was limited and there is no sweeping exception to jury trial rights for administrative hearings.⁵
 20 Concordia also argues that a damages remedy is not exclusively limited to the State, as A.R.S. § 44-
 21 2001 provides for a private cause of action for violations of A.R.S. §§ 44-1841 and 44-1842. Concordia
 22 further contends that the Division's use of the term "restitution" does not diminish Concordia's
 23 rights regarding what is actually a request for damages. Concordia further argues that the Division's
 24

25 ¹ Citing *Fisher v. Edgerton*, 236 Ariz. 71, 81 (App. 2014); *Perkins v. Komarnyckyj*, 172 Ariz. 115, 118 (1992); *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170 (App. 2004); *Mozes v. Daru*, 207 Ariz. 162, 170 (App. 2004).

26 ² Citing *SEC v. Jensen*, 835 F.3d 1100 (9th Cir. 2016).

27 ³ *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245 (App. 2014); *In re Estate of Newman*, 219 Ariz. 260, 272 (App. 2008); *Life Investors Ins. Co. of Am. v. Horizon Resources Bethany, Ltd.*, 182 Ariz. 529, 532 (App. 1995).

28 ⁴ Citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455 (1977) and *Tull v. United States*, 481 U.S. 412, 418, n4 (1987).

⁵ Citing *Granfinanciera v. Nordberg*, 492 U.S. 33, 52-53 (1989).

1 relied upon case law improperly failed to follow the Arizona Supreme Court's instructions to consider
2 the Seventh Amendment, or the United States Supreme Court's Seventh Amendment holdings.

3 Under A.A.C. R14-3-109(C), the Commission may dismiss an application or complaint with or
4 without prejudice. An Administrative Law Judge may recommend dismissal to the Commission.⁶
5 Having considered the arguments posed by the Motion to Dismiss Requested Relief, the Administrative
6 Law Judge finds no basis for a recommendation of dismissal.

7 As noted by the Division, the type of relief sought is statutorily authorized by the Act. The
8 legislature has granted the Commission discretion to order restitution for violations of the Act.⁷ The
9 legislature has also granted the Commission discretion to order administrative penalties, after a
10 hearing.⁸ By statute, the Commission may not order restitution or penalties prior to providing a
11 respondent with notice of a hearing or a notice of an opportunity for a hearing, and the Commission
12 shall provide a hearing when requested.⁹

13 Concordia's arguments challenge the constitutionality of this statutory scheme which places the
14 discretion to order restitution and administrative penalties with the Commission, as well as the process
15 of holding hearings before the Commission. Arizona case law does not support granting Concordia's
16 motion. "We commit to administrative agencies the power to determine constitutional applicability,
17 but we do not commit to administrative agencies the power to determine constitutionality of
18 legislation."¹⁰ "Only the courts have authority to take action which runs counter to the expressed will
19 of the legislative body."¹¹ Even though an agency may not rule on the constitutionality of its own

20 ⁶ See A.A.C. R14-3-109(C).

21 ⁷ A.R.S. § 44-2032 provides, in pertinent part:

22 If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about
23 to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the commission
24 under this chapter, the commission, in its discretion may:

25 1. Issue an order directing such person to cease and desist from engaging in the act, practice or transaction, or doing any
26 other act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable
27 period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction
28 including, without limitation, a requirement to provide restitution as prescribed by rules of the commission.

⁸ A.R.S. § 44-2036 provides, in pertinent part:

A. A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of
the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed
five thousand dollars for each violation.

⁹ See A.R.S. § 44-1972(C), (E).

¹⁰ *Estate of Bohn v. Waddell*, 174 Ariz. 239, 249 (App. 1992) (quoting K. Davis, *Administrative Law Treatise*, § 20.04 at
74 (1958)).

¹¹ *Id.*

1 enabling statutes, the agency may proceed with a hearing as part of the requirement for the exhaustion
2 of administrative remedies, as a hearing would serve to develop a factual record and could potentially
3 moot the constitutional issue if the aggrieved party receives a favorable ruling.¹²

4 Accordingly, the Commission is without authority to rule upon the constitutionality arguments
5 raised by Concordia in the Motion to Dismiss Requested Relief.

6 IT IS THEREFORE ORDERED that **Concordia's Motion to Dismiss Requested Relief of**
7 **Restitution and Administrative Penalties is denied.**

8 IT IS FURTHER ORDERED that **the hearing shall remain scheduled to commence on**
9 **November 30, 2016, at 10:00 a.m., at the Commission's offices, 1200 West Washington Street,**
10 **Hearing Room No. 2, Phoenix, Arizona.**

11 IT IS FURTHER ORDERED that **the parties shall also set aside December 1-2, 5-9, 12, 13,**
12 **15, and 21-23, 2016, for additional days of hearing, if necessary. The previously scheduled hearing**
13 **dates of December 16 and 28, 2016, are vacated.**

14 IT IS FURTHER ORDERED that the respective parties shall arrange for their telephonic
15 testimony witnesses to be available by telephone as needed during the evidentiary hearing,
16 commencing on November 30, 2016, and for those witnesses to call in to the Commission's Hearing
17 Room No. 2 at the appropriate time, using a **landline telephone**,¹³ the telephone number 1 (800) 689-
18 9374, and participant passcode 415962#.

19 IT IS FURTHER ORDERED that **if the parties reach a resolution of the issues raised in the**
20 **Notice prior to the hearing, the Division shall file a Motion to Vacate the Proceeding.**

21 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized
22 Communications) is in effect and shall remain in effect until the Commission's Decision in this matter
23 is final and non-appealable.

24 IT IS FURTHER ORDERED that all parties must comply with Arizona Supreme Court Rules
25 31, 38, 39, and 42, and A.R.S. § 40-243 with respect to the practice of law and admission *pro hac vice*.

26 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance
27

28 ¹² *Estate of Bohn*, 174 Ariz. at 250; see also *Moulton v. Napolitano*, 205 Ariz. 506, 514 (App. 2003).

¹³ Mobile telephones do not provide adequate audio quality to permit the verbatim transcription of witness testimony.

1 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the
2 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances at
3 all hearings and procedural conferences, as well as all Open Meetings for which the matter is scheduled
4 for discussion, unless counsel has previously been granted permission to withdraw by the
5 Administrative Law Judge or the Commission.

6 IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter,
7 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by
8 ruling at hearing.

9 DATED this 28TH day of November, 2016.

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12 MARK PRENT
13 ADMINISTRATIVE LAW JUDGE
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On this 28th day of November, 2016, the foregoing document was filed with Docket Control as a Procedural Order – Denies Miscellaneous Motion/Request, and copies of the foregoing were mailed on behalf of the Hearing Division to the following who have not consented to email service. On this date or as soon as possible thereafter, the Commission's eDocket program will automatically email a link to the foregoing to the following who have consented to email service.

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